

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1742 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

ARKIS INDIA

Versus

DEVELOPMENT CREDIT BANK LTD

Appearance:

MR MB GANDHI for Petitioner
MR MIHIR H JOSHI for Respondent No. 1
SERVED BY AFFIX.(N) for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 25/04/2000

ORAL JUDGEMENT

1. The petitioner in this petition is a decree holder in Civil Suit No.5014 of 1996 in the court of learned 2nd Jt.Civil Judge (S.D.), Ahmedabad (Rural). The first respondent is a bank who had raised objection against the attachment of the movable properties of respondent no.2 who happens to be the judgment debtor in the said civil suit.

2. The petitioner obtained money decree against second respondent in the aforesaid civil suit and filed Execution Petition being Execution Petition No.1 of 1998

before the civil court at Ahmedabad. Certain properties were taken into the attachment and the first respondent raised objection against the attachment of the property saying that certain properties are under the registered charge of the first respondent and therefore they could not be attached. However, so far remaining properties are concerned, the first respondent had no objection if other movable properties listed in the Bailiff's list, save and except the goods which have been hypothecated to the Bank as stated above, are sold and disposed off without, in any manner, jeopardising the Bank's security.

3. After hearing the parties, the learned Executing Court passed the order allowing the said application of the first respondent and directing that the attached property of the judgment debtor be sold subject to the charge of the third party i.e. respondent No.1. It is further stated in the order that sale price be adjusted to charge.

4. Feeling aggrieved by the said order of the trial court dated 2nd November, 1998, the petitioner decree holder preferred this Revision application.

5. It has been contended here that several properties enumerated in the list prepared by the Court Commissioner have actually not charged with respondent no.1, and therefore, they could not be sold subject to the charge. Therefore according to the case of the petitioner, the aforesaid order of the Executing Court is illegal and hence, it is required to be set aside. It is, therefore, prayed that the present revision application be allowed and the aforesaid order of the Executing Court be set aside.

6. Rule was issued and appearance has been made on behalf of first respondent and no appearance for respondent no.2. I have heard learned advocates for the parties and perused the papers.

7. Mr.M.B.Gandhi, learned advocate for the petitioner has argued at length and state that there are many properties which have not been placed in charge with the first respondent and therefore those properties could not be allowed to be sold subject to the charge of the first respondent. According to his argument, the properties mentioned at Serial No.26, 32, 34, 35, 57, 59, 62, 63 to 66, 73, 74, 76 to 79 and 81 are the properties which are not machineries and, therefore, it cannot be held that these properties have been hypothecated with the first respondent by the second respondent and,

therefore, those properties could not be allowed to be sold subject to the charge of the first respondent. Therefore, the order of the Executing Court is illegal so far these properties are concerned and therefore the said order is sought to be set aside.

8. Now if we go through the averments made in the revision, it is very clear that the petitioner has stated in the revision petition itself that on 21st April, 1998, various movable properties lying in the factory premises of respondent no.2 were attached and possession was taken by the bailiff by drawing a proper panchnama. That the said goods attached under the Jangam warrant were placed in the custody of the present petitioner. That the petitioner had to hire a godown for storing the same. This mean that all these properties are lying in a godown which has been hired by the petitioner and therefore it is very clear that these properties are at present in the custody of the petitioner.

9. Now so far hypothecation is concerned, para 4 of the order of the Executing Court makes it clear that the third party i.e. first respondent has filed the application on affidavit at Exh.65 and has produced counter affidavit at Exh.73, third party has produced deed of hypothecation of tangible movable machinery and deed of tangible movable property at the leaf No.74. It is further stated on behalf of first respondent that documents are also filed at Exh.61 i.e. Central Excise Order, copy of suit filed against judgment debtor and copy of Central Excise Department's notice Mark 75/1. The third party has produced charge certificate for movable machinery and mark 75/2 is deed of registration of charge on mortgaged movables. This mean that the hypothecation has not been restricted to the machineries but it has also covered the movable properties other than the machineries.

10. It, therefore, cannot be said that only machineries have been hypothecated and other movables have not been placed in charge by the 2nd respondent in favour of first respondent. It has been observed in para 5 of the order of the Executing Court that, in Mark 75/2 it is stated that all the goods, chemicals, clothes are lying in plot No.928 are already charged. This further makes it clear that only machineries have not been hypothecated but other movable properties are also in charge of the first respondent.

11. In aforesaid view of the matter, it cannot be said that the Executing Court has committed illegality in

holding that all these properties enumerated in the charge Mark 75/1 and 75/2 are really the properties under the charge of the first respondent. The learned advocate for the petitioner has argued that the property in charge of the first respondent could not be sold in the execution petition of the petitioner. It would be open to the petitioner to submit an application that only the properties which are not under the charge of the first respondent be sold in the execution petition and rest of the properties be released to the first respondent and it would be for the first respondent to make an appropriate arrangement for the safe custody of those properties. No such application appears to have been made. In fact when an application is filed by the objector claiming certain properties to be its property then proper course would be to release those properties in the execution petition without directing that all the properties be sold and sale proceed with respect to the properties of the objectors be paid to the objectors and rest be paid to the judgment debtor. The petitioner will therefore be at liberty to make appropriate application before the executing court to separate the two properties and put to auction only the property of the second respondent free of charge with a liberty to the first respondent to make appropriate arrangement for the safe custody of the property in its charge.

12. However, it has been made clear that, at the interim stage, this Court has passed an order permitting the further execution of the decree and in the said process the undisputed property of the second respondent has been sold out as per the statement made by the learned advocates for the parties. Therefore those properties not under the charge of the first respondent have been already auctioned and therefore nothing is required to be done in this behalf. Learned advocate for the petitioner also argues that the petitioner is required to undergo expenses for godown, rent etc., for the safeguard of the property in question. Again he will be at liberty to make appropriate application before the executing court for appropriate expenses for the safeguard of the said property in question. Parties will be at liberty to make application before the Executing Court for transfer of custody of property from petitioner to respondent no.1. The Executing Court will pass an appropriate order on merits after hearing the parties.

13. With these observations, I found that there is no merit in this revision application and therefore it is ordered to be dismissed. Rule is discharged as indicated above. Considering the facts and circumstances of the

case, there shall be no order as to costs.

(D.P. Buch, J.)

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